



Criminal Defense Attorneys of Michigan

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The Honorable Clifford W. Taylor
Michigan Supreme Court
Post Office Box 30052
Lansing, Michigan 48909

re: *ADM File No. 2007-38*

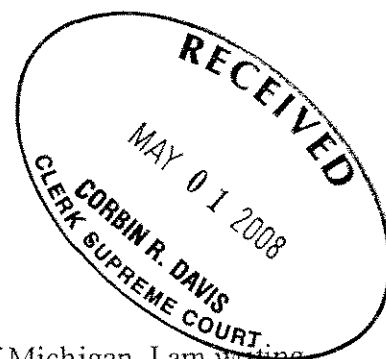
Dear Chief Justice Taylor:

On behalf of the Criminal Defense Attorneys of Michigan, I am writing to express the support of CDAM for the proposal contained in ADM File No. 2007-38. Specifically, CDAM supports the proposed amendment of MCR 6.201(B)(1) to require the prosecuting attorney to provide to a defendant "any exculpatory information or evidence known to the prosecuting attorney," regardless of whether the defendant has specifically requested such information or evidence. This proposal would amend the current version of the court rule, which requires the prosecution to provide such information or evidence only "upon request."

The Staff Comment to ADM File No. 2007-38 states, "The Court would appreciate specific comments on whether a court rule requiring the prosecuting attorney to provide the defendant with exculpatory information or evidence is necessary, in light of the prosecuting attorney's constitutional obligation to do so under *Brady v Maryland*, 373 US 83 (1973), and, if so, whether the proposed amendment of MCR 6.201(B)(1) is consistent with the requirements of *Brady*." In CDAM's view, the answer to both questions is "yes."

1. The Need for MCR 6.201(B)(1).

MCR 6.201(B)(1), both in its current version and as proposed, serves as an important reminder to law enforcement of its due process obligations as enunciated by *Brady* and its progeny. To be sure, there are occasions where potentially exculpatory information will be made available to the defense in the course of a prosecutor providing other discovery materials, but certainly not always. Where such information is not contained in those materials, it is prudent to have an explicit reminder in the discovery rules that the prosecutor bears this additional obligation. Such a requirement helps to ensure that the obligation is not overlooked or evaded, especially where the prosecutor (or, oftentimes, a less experienced assistant prosecutor), burdened with many demands on his or her time, might otherwise not be focused on it.



In addition to this "reminder" function, discovery rules serve to ensure that information is provided in a timely manner. At present, the prosecutor must provide discovery, including exculpatory information, within 21 days of request. CDAM anticipates that, if the proposed amendment were adopted eliminating the "request" trigger for exculpatory information, the Court would require that exculpatory information be provided in at least as timely a fashion (for example, within 21 days of arraignment, or of the prosecutor discovering the information, whichever is later). However, if MCR 6.201 eliminated the requirement that such information be provided as part of standard discovery, it would be left to the discretion of each individual prosecutor when such information would be provided. At worst, this would encourage gamesmanship on the part of law enforcement, to the unjust detriment of the defense at trial; at best, it would result in an inefficient pretrial process and inequities between the prosecution and defense when it comes to negotiating pretrial resolution and other pretrial issues. These outcomes are precisely the sort that constitutional notice requirements, and indeed discovery rules generally, are intended to prevent.

2. The Proposed Amendment is Consistent With *Brady*.

Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.*, 373 US at 87. Following *Brady*, there was some question whether its holding rested on the fact that the defense had requested the exculpatory material, and whether the same due process right adhered even in the absence of such request.

The United States Supreme Court finally addressed this particular issue in *United States v Bagley*, 473 US 667 (1985). Although there was some difference in analysis between the two opinions that constituted the Court's judgment, the conclusion was that any suppression of material *Brady* evidence violated due process, regardless of defense request. As summarized later in *Kyles v Whitley*, 514 US 419, 433-434 (1995), "*Bagley* held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government; 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " (Emphasis added; citations omitted.)

The proposed amendment to MCR 6.201 is entirely consistent with *Brady*. Indeed, the only instance in which it could be inconsistent is the where "exculpatory" evidence turned out somehow to be "immaterial." Not only is this

a difficult circumstance to envision (especially in the pretrial context), it would seem not to be a circumstance where the Court should leave the initial exercise of discretion with one party, the prosecutor. Rather, prudence in terms of encouraging compliance with constitutional due process dictates that such evidence be disclosed early on, as a matter of standard discovery, regardless of defense request.

Conclusion.

For the reasons discussed above, CDAM urges this Court to adopt the proposed amendment to MCR 6.201(B)(1).

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Shea', with a long horizontal flourish extending to the right.

John A. Shea, Co-Chair
Rules and Laws Committee
Criminal Defense Attorneys of Michigan

cc: Corbin R Davis, Clerk, Michigan Supreme Court